Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1997

FRED E. YOUNG, INC.,

Petitioner

vs.

BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

By holding that the tax sale appearing within Respondent's chain of title discharged any claim of superior title that may have accrued in Petitioner's predecessors in title prior to that time, has a panel for the Superior Court of Pennsylvania denied Petitioner of its Federal constitutional right not to be deprived of property without due process of law?

Answer: Affirmative.

PARTIES TO THE PROCEEDINGS

FRED E. YOUNG, INC., Petitioner

BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION, INC., Respondent

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The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

(X) reported at 697 A.2d 984; or,

( ) has been designated for publication but is not yet reported; or,

( ) is unpublished

The opinion of the Court of Common Pleas of Blair County, Pennsylvania appears at Appendix C to the petition and is

( ) reported at _____; or,

(X) has been designated for publication but is not yet reported; or,

( ) is unpublished

STATEMENT OF JURISDICTION

The date on which the highest state court decided this case was March 16, 1998. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States—"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves the question of which of the above-named parties is to be regarded as the lawful owner of a certain parcel of land in Blair County, Pennsylvania, once viewed as mere farmland and timberland, but now viewed as far more valuable land because of the construction of new Route 220 through it, with the attendant compensation to be paid by the Commonwealth of Pennsylvania for the taking of ground for such Route. It is a controversy that has been ongoing for more than thirty (30) years. It has a history that, arguably, is second to none of the other cases which have been presented to this Court for review.

On April 28, 1966, Fred E. Young, Inc. brought an action to quiet title against Brush Mountain Sportsmen's Association at No. 101 March Term 1966 in the lower court. That action sought to quiet the title of Fred E. Young, Inc. to a disputed parcel of land on the bases of record title and adverse possession. Following hearings on September 26, 1967, February 28, 1968 and July 29, 1968, the case was taken under advisement.

Judge O'Kicki from Cambria County, who had not presided at any of these hearings, was later appointed to decide the case on the basis of the record which already existed. This occurred after the original trial judge had retired and a second trial judge had died. After the parties, through replacement counsel, stipulated as to the record which he was to consider, Judge O'Kicki did render an Opinion with Order under separate cover dated June 10, 1981. However, it was not filed until April of 1984.

This Order denied the requested relief of quieting title in Fred E. Young, Inc. to the parcel in dispute. Exceptions to that Order were filed by Fred E. Young, Inc. These Exceptions

were later dismissed by Judge O'Kicki in his Order of October 6, 1986. However, no final judgment was entered by Judge O'Kicki dismissing the Complaint filed by Fred E. Young, Inc. at any time. Neither party took any further action thereafter with respect to that case.

On February 26, 1991, Fred E. Young, Inc. filed the present case against Brush Mountain Sportsmen's Association, seeking declaratory relief that Fred E. Young, Inc., as between the two parties, be recognized as the owner of the parcel in dispute. Preliminary Objections in the nature of a demurrer were filed by Brush Mountain Sportsmen's Association because of Judge O'Kicki's ruling in the earlier case. The lower court per Judge Kopriva granted these Preliminary Objections and dismissed the action.

Appeal was taken by Fred E. Young, Inc. from such dismissal to the Superior Court of Pennsylvania, Pittsburgh District, at No. 2000 PGH 1991. On August 20, 1992, a Judgment was rendered by the panel of that Court deciding the appeal. This Judgment reversed the Order of Judge Kopriva and remanded the case for further proceedings. In its Memorandum accompanying the Judgment, the panel specifically noted and found that no final judgment had ever been entered against Fred E. Young, Inc. on the earlier case and that there was not identity of the cause of action needed for *res judicata* between that case and this one. The Supreme Court of Pennsylvania denied *allocatur* on petition of Brush Mountain Sportsmen's Association.

Following remand, trial of this matter was held before the lower court on September 27-28 and December 27, 1995. At trial, Brush Mountain Sportsmen's Association based its record title to the land in dispute on the John Porter Warrant. This Warrant was issued on July 6, 1795. A survey pursuant to

the Warrant was made on November 3, 1795. A patent was then issued on March 24, 1800.

In opposition, Fred E. Young, Inc. based its title to the land in dispute on the Ludwick Sells Warrant. This Warrant was issued on March 14, 1786. The survey pursuant to the Warrant was made on October 24, 1794. A patent was then issued on September 2, 1834.

Since the Ludwick Sells survey was filed prior to the John Porter survey, the record title of Fred E. Young, Inc. as a successor owner to the patentees of the Ludwick Sells tract was argued to prevail over that title held by Brush Mountain Sportsmen's Association as the successor owner to the patentees of the John Porter tract. While recognizing that priority of ownership depends on priority of survey, Brush Mountain Sportsmen's Association argued that did not mean it lost on the basis of record title, since the land covered by the Ludwick Sells survey was and is not located where Fred E. Young, Inc. has claimed it to be, so as to interfere with a portion of what was included within the John Porter survey. It argued such land is located further north so that it falls within another, or William Allen tract, altogether.

Fred E. Young, Inc.'s predecessors in title had settled on the Sells' land where Fred E. Young, Inc. has claimed it to be. The land was farmed in part and enclosed by fencing along the parcel in dispute between the parties. Fred E. Young, Inc.'s predecessors had been on the land for a period in excess of one hundred and ten years prior to its sale to Fred E. Young, Inc. In addition, a large part of the land which Fred E. Young, Inc. purchased was later developed in a residential subdivision. For these reasons, Fred E. Young, Inc. argued that if its predecessors did not have record title, they acquired the parcel in dispute as part of the whole tract by adverse possession. Furthermore, Fred E. Young, Inc. argued Brush Mountain

Sportsmen's Association was estopped by deed references within its own chain of title that recognized Fred E. Young, Inc.'s predecessors as adjoining landowners for the parcel in dispute.

After taking the case under advisement and receiving memoranda from both sides, the lower court, per Judge Callan, issued an Adjudication with attached Decree Nisi dated February 21, 1996. This Adjudication found title in Brush Mountain Sportsmen's Association to the parcel in dispute and held Fred E. Young, Inc. had no legal or equitable interest in the same, in large measure because of Judge O'Kicki's findings and conclusions in the earlier case. The Decree Nisi became final, after Judge Callan denied exceptions filed by Fred E. Young, Inc. through counsel. A timely appeal to the Superior Court of Pennsylvania followed.

On appeal, both parties filed extensive briefs and reproduced records. Argument was scheduled and heard before a panel of the Superior Court. At the argument, the panel indicated its fascination with both the historical and procedural aspects of the dispute underlying this case.

On June 24, 1997, the panel affirmed judgment in favor of Brush Mountain Sportsmen's Association by the lower court. Accompanying this action was an extensive Opinion. Because of what were believed to be significant factual as well as legal errors in the Opinion, even though the panel had found Judge Callan had erred by relying on what Judge O'Kicki had done earlier, Fred E. Young, Inc. through counsel filed an Application for Reargument before the entire Superior Court.

Among these errors was the Court's holding that because a tax sale appeared in Respondent's chain of title, any claim of superior title which Petitioner's predecessors in title may have had to the property prior to that time was discharged by the sale. Petitioner by counsel specifically argued that such a

holding would deprive Petitioner, through its predecessors, of property without due process of law. Because a dual assessment of the property appears to have occurred, no notice of the sale was given to Petitioner's predecessors, even though they were in possession of the property in dispute. Absent notice, there could not be any basis for a claim of discharge or forfeiture.

Shortly before the time for decision on the Application for Reargument was to lapse, an Order denying the same without comment was entered on September 4, 1997. From that Order, a Petition for Allowance of Appeal was filed in the Supreme Court of Pennsylvania by Fred E. Young, Inc. through counsel. Again, within that Petition, the same argument that Petitioner's due process right was violated was made. On March 16, 1998, a Per Curiam Order was entered by that Court denying the Petition. Following that denial, the instant Petition for Writ of Certiorari is taken to this Court.

REASONS FOR ALLOWANCE OF THE WRIT

The panel for the Superior Court of Pennsylvania violated Petitioner's constitutional right not to be deprived of its property without due process of law, in finding that Petitioner's predecessors in title had forfeited Petitioner's right to claim superior title by their not attacking the tax sale through which Respondent based its claim of ownership. Petitioner's predecessors in title were in possession of the land in dispute at all times. Yet, there was no evidence presented to establish that Petitioner's predecessors in title were put on notice, by posting or otherwise, that the land of which they were in possession was included within what was being sold at tax sale. Due process at a minimum requires notice.

That is why a taxing authority is under a duty to ascertain the true and lawful owners of any real property returned for taxes before selling that property and thereby ending any further ownership rights which that party would or might otherwise have. See 72 P.S. Section 5971g; *Fidei v. Underwood*, 291 Pa. Superior Ct. 375, 435 A.2d 1275 (1981); and *Patterson v. Oakes*, 260 Pa. Superior Ct. 415, 394 A.2d 995 (1978). The panel's decision, therefore, is inconsistent with both prevailing statutory and case authority emanating from that same Court. This is true despite the panel's attempted reliance on *Torch v. Constantino*, 227 Pa. Superior Ct. 427, 323 A.2d 278 (1974).

In the *Torch* case, the Superior Court held that a claim for adverse possession would not be deemed to run during the period when real property is returned for unpaid taxes and is awaiting sale to a purchaser. There, an adverse possessor claimed superior title to that of the purchaser at a tax sale. Part of the requisite period for the claim of adverse possession ran

after the property had been returned for taxes. If the panel in *this case* were correct in its assumption that a tax sale discharges not only liens but claims of superior title, there would have been no need for the Superior Court in that case to render the precise decision which it did. The Superior Court could simply have indicated that since there was a tax sale, that sale by itself worked a discharge of the adverse possession claim.

The fact that the Superior Court held the way it did in *Torch* compels the conclusion that claims of superior title are *not* discharged, even though liens can be. If the adverse possessor had met the requisite period before the return of the property for unpaid taxes, the Court would have invalidated the claim to title by the purchaser at the tax sale. There can be no other fair conclusion from an analysis of that case.

The record in this case indicates that, at best, there was a dual assessment of the land in dispute to both Fred E. Young, Inc. and Brush Mountain Sportsmen's Association and their predecessors in title or, at worst, an assessment of the property to Fred E. Young, Inc. and its predecessors. Support for the latter statement can be found in how the tax assessment authorities had showed the ownership of the land in dispute to be. They indicated that Fred E. Young, Inc., not Brush Mountain Sportsmen's Association, was the owner on the tax assessment map. It was only after Brush Mountain Sportsmen's Association had disputed Fred E. Young, Inc.'s ownership that a change occurred—long after the tax sale had been held.

The importance of the panel's holding should be obvious. There are literally hundreds of thousands of tax sales which regularly occur each year throughout the country. A large number will involve dual assessments. If the panel's contention that a tax sale discharges not only liens but claims of superior title to such property by others who may be in possession of

such land but are not notified of the purported sale of such land for unpaid taxes is allowed to stand, real questions can and will arise as to who is to be regarded the true and lawful owner of such land in many, many instances.

The panel's holding is erroneous and should be declared so. If it is not declared to be so, this case can and will be used as precedent for land disputes that will arise in the future. Not only will Petitioner in this case be deprived of property without due process by what the panel has done, but others in similar situations to that in which Petitioner finds itself may be deprived of their property by the same case as well. While this Court does not grant a writ of certiorari merely because another court has committed both factual as well as legal error, this Court can and should grant such a writ if the error is so great as to cause actual or potential damage not only to one party but also to many other parties nationwide over time. That is the present case, simply stated. This Court should intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
BOOSE & YOUNG, P.C.
CAROLANN A. YOUNG

APPENDIX A

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT
No. 659 Pittsburgh 1996

Fred E. Young Inc., Appellant

v

Brush Mountain Sportsmen's Association

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Blair County be, and the same is hereby AFFIRMED.

BY THE COURT:
/s/Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: June 24, 1997

J. A04039/97

In the Superior Court of Pennsylvania
Pittsburgh Office
No. 00659 Pittsburgh, 1996
FRED E. YOUNG, INC.,

Appellant

v.

BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION

Appeal from the Decree of the Court of Common Pleas, Blair County, Civil Division, at No. 392 C.P. 1991.

BEFORE:
FORD ELLIOTT, SCHILLER and BROSKY, JJ.

OPINION BY BROSKY, J. FILED: June 24, 1997

This is an appeal from the final decree entered in this declaratory judgment action. Appellant presents the following issues for review: (1) whether the trial court erred in determining that appellee had title to the land; (2) whether appellant acquired the property by adverse possession; (3) whether the trial court erred in denying appellant's petition requesting that other landowners be notified of this action and permitted to intervene; (4) whether the trial court was bound by the factual findings and conclusions of law made by a different judge in a prior action involving the same parties; (5) whether the procedure followed by the trial court was arbitrary and prejudicial; and (6) whether the doctrine of estoppel by deed bars a finding for appellee. For the reasons set forth below, we affirm.

Before addressing these claims, it is necessary to recount the pertinent history of this case. During the late 1700's, the parties' predecessors in title, Ludwick Sells, William Allen and John Porter, began to settle the Pennsylvania wilderness in

what is now Blair County.[1] Ludwick Sells was granted a warrant in 1786, but did not have his property surveyed until 1794. The Porter and Allen tracts were respectively warranted and surveyed in 1795 and 1796. However, both the Porter and Allen warrants noted that there were improvements on the land and that the owners' respective interests commenced as of 1792. Patents were later issued for the Porter, Allen and Sells tracts in 1800, 1808 and 1834, respectively.

The surveys of the Porter, Allen and Sells tracts were all performed by the same individual, John Canan.[2] The Sells survey identified William Allen and Michael Fetters as adjoining landowners. Neither the Porter nor Allen surveys referred to Sells as an adjoiner, however.[3] For reasons which are unclear, Sells did not settle on the land identified in his survey as adjoining that of Allen and Fetters. He instead located to the southwest on a tract adjoining John Porter's land.

Appellee, Brush Mountain Sportsmen's Association (Brush Mountain), acquired the land formerly owned by John Porter by two separate conveyances in 1948 and 1949. Appellant, Fred E. Young, Inc. (Fred Young) subsequently purchased the former Sells tract in 1965. After appellant bought the property, a dispute arose between the parties as to the ownership of approximately forty acres of land encompassed within the metes and bounds descriptions of both the Sells and Porter tracts. Consequently, appellant commenced a quiet title action against appellee in April of 1966.

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[1] William Allen is also referred to as "William Allon." The former spelling will be utilized throughout this discussion.

[2] The certified record also refers John Canan as "John Canon." We will use the former spelling in our discussion.

[3] Porter's survey identified "the London land" as an adjoiner on the west and noted that Michael Fetters and John David's claim as adjoiners on the northern and southern sides, respectively. Allen's survey indicated that his land was adjoined by "the London land" on the west and John Porter on the south.

The Honorable Samuel Jubelirer conducted hearings thereon in September, 1967, March 1968 and July, 1968. For reasons which do not appear of record, the case languished in the Court of Common Pleas until 1981.[4] On June 10, 1981, Judge O'Kicki issued an order denying appellant's quiet title action, but this order was not entered upon the docket until April 16, 1984. Appellant timely filed exceptions, as well as post-trial motions and supplemental post-trial motions to the trial court's order. Judge O'Kicki dismissed the exceptions in October of 1986, but a final judgment was never entered. No appeal was taken.

Appellant renewed its request for relief by filing the instant declaratory judgment action against appellee in February of 1991. Appellee filed preliminary objections asserting that the action was barred by reason of the doctrine of res judicata. Judge Jolene Grubb Kopriva agreed and dismissed appellant's complaint. Appellant timely appealed to this court. In an unpublished memorandum, we reversed and remanded for trial. *See Fred E. Young, Inc. v. Brush Mountain Sportsmen's Association*, 424 Pa. Super. 658, 617 A.2d 399 (1992) (No. 02000 Pittsburgh 1991). The Supreme Court declined to grant *allocatur*. *Id.*, 533 Pa. 611, 618 A.2d 401 (1992).

Upon remand of the case, appellant filed a motion for summary judgment as well as a petition for rule to show cause why certain other property owners should not be notified of this litigation and permitted to intervene therein. The trial court denied both motions. The Honorable Norman D. Callan, sitting as the sole trier of fact, conducted a three day trial on September 27 and 28, 1995 as well as on December 27, 1995.

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[4] During the interim, it appears that Judge Jubelirer was no longer on the bench. Consequently, Judge O'Kicki was specially assigned to the case.

Judge Callan filed an adjudication and decree *nisi* in February, 1996. Appellant timely filed post-trial motions which were ultimately dismissed. A final decree was thereafter entered upon the docket. Appellant timely appealed therefrom.

When reviewing the decision of the trial court in a declaratory judgment action, our scope of review is narrow. *O'Brien v. Nationwide Mutual Insurance Co.*, Pa. Super. , , 689 A.2d 254, 257 (1997). Consequently, we are limited to determining whether the trial court's findings are supported by substantial evidence, whether an error of law was committed or whether the trial court abused its discretion, *Walker v. Ehlinger*, 544 Pa. 298, 300 n.2, 676 A.2d 213, 214 n.2 (1996).

> The test is not whether we would have reached the same result on the evidence presented, but whether the trial court's conclusion can reasonably be drawn from the evidence. Where the trial court's factual determinations are adequately supported by the evidence we may not substitute our judgment for that of the trial court.

Clearfield Volunteer Fire Department v. BP Oil, 412 Pa. Super. 29, 31-32, 602 A.2d 877, 879, *allocatur denied*, 531 Pa. 650, 613 A.2d 556 (1992) (citations omitted). We shall evaluate the decision of the trial court with these considerations in mind.

Appellant contends that the trial court erred in concluding that appellee rather than appellant was the owner of the disputed land. In support of this claim, appellant relies upon the fact that his predecessor in title, Sells, was the first to survey the land in question. Appellant thus asserts that it has superior title. Appellant's assessment is erroneous.

Contrary to appellant's belief, the Sells survey did not cover the disputed land. Sells' survey calls for the land as being adjoined by the London land as well as the property of William

Allen and Michael Fetters.[5] *See* Plaintiff's Exhibit 5 (Survey of Ludwick Sells' Tract). Based on the description set forth in this survey, the Sells tract was situated northeast of the parcel in dispute here. *See* Plaintiff's Exhibit 2 (Connected Draft of 17 tracts of land, which depicts the location of the Sells, Porter, Allen and other tracts pertinent to this case). Porter's survey, however, specifically includes the contested land. *See* Defendant's Exhibit 15 (Survey of John Porter's Tract).

We recognize that the precise location of the Sells tract was a matter that was vigorously contested by the parties, with each supplying expert testimony as well as documentary evidence on this matter. It thus fell to the trial court to evaluate the conflicting evidence and testimony on this subject. The trial judge resolved this issue in favor of appellee by concluding that the Sells survey did not describe the land at issue here and, therefore, did not include the disputed tract. Having thoroughly examined the testimony of the witnesses and the other evidence presented at trial, we find that the trial judge's decision is amply supported by the record. Because appellee's predecessor, John Porter, had superior title and was the first to record a survey covering the disputed property, the trial court did not err in finding in favor of appellee. *See, e.g., Parshall v. Jones*, 55 Pa. 153, 159 (1867) (affirming judgment in favor of defendant, because he had older paper title and was the first to accurately survey the land in dispute).

Even were we to assume, purely for the sake of argument, that Sells' survey covered the disputed parcel appellant still would not be entitled to any relief. Although Sells' survey was completed before the Allen and Porter surveys and Sells seemingly has the older title, appellee nonetheless must prevail because Allen and Porter held their land by improvements

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[5] Fetters' name is also spelled as "Fetter." We will use the former spelling for purposes of clarity and consistency.

which predated Sells' survey. To explicate why appellant's title is inferior to that of appellee, it is necessary to review the pertinent law.

All of the parties' predecessors in title acquired land directly from the Commonwealth pursuant to the statutes which were then in effect. *See* 64 P.S. §1-§616 (describing the allodial system in Pennsylvania devolving from the rights of former proprietaries). Pursuant to these acts, "there were but two modes of acquiring title to public lands—one by settlement and improvement, the other by warrant and survey. And when either is adopted, due diligence in perfecting the right was always required." *Parshall v. Jones*, 55 Pa. at 157. Where land was acquired by the former method, "the title of the settler relate[d] back to the time of entry, and the first stroke of the axe," provided that he followed up his inceptive title with that degree of due diligence which the law requires of settlers, *i.e.*, applying for a warrant and returning a survey on the land. *Emery v. Spencer*, 23 Pa. 271, 277, 278 (1854). If land was acquired pursuant to the second method, "a precisely descriptive warrant g[ave] title from its date, and a vague one from the time of survey. ..." *Id.*, 23 Pa. at 275.

Regardless of whether the warrant is descriptive or vague, the warrant imposes on the holder the duty of having it surveyed and returned to the Surveyor-General's Office in a reasonable time. *Id.* When a survey is not returned or no survey is made within seven years of the time the interest in land commences, the warrantee is presumed to have abandoned his claim. *Id.* In such a case, the original warrantee may lose out to a subsequent claimant who applies for the land and perfects his title. *Id.*, 23 Pa. at 275-277. Application of these principles persuades us that the trial court did not err in finding that appellee had better title to the land.

The record reflects that Ludwick Sells was issued a warrant on March 14, 1786. *See* Plaintiff's Exhibit 4-A (Ludwick Sells' warrant). The warrant does not specify the location of the land. It is instead drafted in vague language which provides:

> WHEREAS, Ludwick Sells ... hath requested to take up One hundred Acres of Land, on the waters of little Juniata about three miles below Gullaphers on the old Trading path that passes said Gullaphers adjoining James Igoes Claim between the London Land and Bald Eagle Ridge in Frankston Township in the County of Bedford.

Id. In addition, the warrant makes no mention of improvements upon the land and provides that Sells' interest was to commence from the date of the warrant, *i.e.*, March 14, 1786. *Id.* Sells' land was surveyed on October 24, 1794. Plaintiff's Exhibit 5 (Survey of Ludwick Sells' Tract).

By contrast, the warrants to both Porter and Allen are more specific as to the location of the land and indicate that the tracts were held by improvements. Each warrant is set forth *seriatim*.

> WHEREAS William Allen ... hath requested to take up Four hundred acres of land Including improvement bounded by the London Land on the East and the Brushe [sic] Ridge on the Southwest including two small Runs which empties [sic] into the Little Juniata River in Bald Eagle ... Allegheny Township in the county of Huntingdon .... Interest to commence from the first of June 1792 ... .

Defendant's Exhibit 2 (William Allen's warrant).

> WHEREAS John Porter ... hath requested to take up Four hundred acres of land Including an improv't in Bald Eagle Creek Valley adjoining land of John Deavson's

> on the South West and the Lond Comp. land on the North in Allegany [sic] Towp. in the county of Huntingdon ... . Interest to commence from the first of September 1792 ... .

Defendant's Exhibit 27 (John Porter's warrant).[6]

If Sells' warrant is construed to be vague, his title would only date from the day of his survey, *i.e.*, 1794. *Emery v. Spencer, supra.* Allen's and Porter's interests, however, date from the time their interests commenced in 1792 as their warrants are not only more specific in description, but more importantly, provide that they held their land by improvements thereon. *See* Allen Warrant and Porter Warrant, *supra.* Tax records further evidence settlement, at least as to Allen. *See* Defendant's Exhibit 3 (copy of excerpt from History of Blair County at page 101 which reveals that William Allen was listed as a resident taxpayer of the county as early as 1788, and that he owned taxable herds of horses and cattle). Consequently, Allen and Porter's title would be superior to that of appellant in the event the Sells' warrant is construed to be vague. *Emery v. Spencer, supra.*

Our conclusion would remain the same even if Sells' warrant is deemed to be specific. After obtaining his warrant in March of 1786, Sells waited until October of 1794, more than eight and one-half years later, before taking any action to perfect his interest by having the land surveyed and a return made thereon. Accordingly, a presumption of abandonment arises. *Emery v. Spencer, supra.* Nothing was proffered to rebut the presumption, such as evidence of Sells' possession of the land or erecting improvements thereon. *See id.*, 23 Pa. at 277 (possession of the land and improvements made constitute the only exception to the general principle that abandon-

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[6] The individual identified in Porter's warrant as John Deavson appears to be the same person identified on Porter's survey as John David.

ment will be presumed after seven years' delay to return a survey). Under these circumstances, Sells must be deemed to have abandoned his claim by allowing more than seven years to elapse after procuring his warrant. *See id.*, 23 Pa. at 275 (the court can conclude as a matter of law, that a warrantee has abandoned a claim after a lapse of seven years when there is no proof of circumstances to rebut the presumption).

As previously discussed, Allen and Porter were in possession of their respective property and they held their land by improvements commencing in 1792, more than two years before the survey of Sells' land. Because their titles date to the time of their entry upon the land, their titles are paramount to that of Sells. *See id.*, 23 Pa. at 278 (occupant who settled on the land before it was surveyed by warrant holder had superior title; warrant holder was deemed to have abandoned his claim by allowing nearly fourteen years to elapse before surveying the property).

In its second allegation of error, appellant contends that it acquired title to the property by adverse possession. Appellant does not support his argument with citation to any pertinent legal authority in contravention of Pa.R.A.P., Rule 2119, 42 Pa.C.S.A. When the appellant has failed to cite any authority in support of a contention, the claim is waived. *Bunt v. Pension Mortgage Associates, Inc.*, 446 Pa. Super. 359, 368, 666 A.2d 1091, 1095 (1995). However, appellant would not be entitled to any relief even if we were to consider this issue.

> It is well settled that a party claiming title to real property by adverse possession must affirmatively prove that he or she had actual, continuous, distinct, and hostile possession of the land for twenty-one years. Each of these elements must exist, otherwise the possession will not confer title. An adverse possessor must intend to hold the land for himself, and that intention must be made mani-

> fest by his act. ... He must keep his flag flying and present a hostile front to all adverse pretensions.
>
> Broadly speaking, actual possession of land is dominion over the land; it is not equivalent to occupancy. There is no fixed rule, however, by which the actual possession of real property by an adverse claimant may be determined in all cases. The determination of what constitutes actual possession of property for purposes of adverse possession depends on the facts of each case, and to a large extent[,] on the character of the premises.
>
> The words visible and notorious possession ... mean that the claim of ownership must b[e] evidenced by conduct sufficient to place a reasonable person on notice that his or [sic] land is being held by the claimant as his own. To constitute distinct and exclusive possession ... it need only be a type of possession which would characterize an owner's use. For example, ... maintain[ing] [a] lot by cutting the lawn and by planting ... thereon various shrubbery and flowering plants [will suffice].
>
> •••
>
> Finally, in order for adverse possession to ripen into title, it is necessary to show that such possession has been continuous and uninterrupted for the full statutory period. In this Commonwealth, ... the statutory period is twenty-one years. The law does not require that the claimant remain continuously on the land and perform acts of ownership from day to day.

Glenn v. Shuey, 407 Pa. Super. 213, 221-223, 224, 595 A.2d 606, 610-611, 612 (1991) (citations and quotation marks omitted).

Appellant purchased its land in 1965. Ownership of the disputed land has been the subject of litigation between the

parties since 1966. Appellant accordingly must tack its predecessor's period of adverse possession for adverse possession to exist. In order for possession to be tacked, there must be privity between the successive occupants of the property. *Id.*, 407 Pa. Super. at 225, 595 A.2d at 612.

> Privity refers to a succession of relationship to the same thing, whether created by deed or other acts or by operation of law. But a deed does not itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land and uses it in connection with that conveyed ... .

Id., 407 Pa. Super. at 225, 595 A.2d at 612-613 (citations and quotation marks omitted). As cogently explained in a recent decision by this court:

> Acceptance of a deed describing boundary lines confines the premises conveyed to the area within the boundaries, and such a deed does not convey inchoate rights acquired by incompleted adverse possession. Each predecessor must have claimed title to the property in dispute, and in transferring to his successors[,] must have purported to include it.

Moore v. Duran, Pa. Super. , , 687 A.2d 822, 829 (1996) (citations and quotation marks omitted). *Accord Glenn v. Shuey, supra.*

The record reflects that appellant's predecessors in title were the Delancey heirs. The Delancey family first acquired the Sells tract in 1855. Since that time, members of the Delancey family have transferred the property amongst themselves. With the exception of a five acre parcel located at the southern end of the property which had been previously

conveyed, all of the remaining acreage was retained by the Delanceys and was ultimately conveyed to appellant. Privity therefore exists between appellant and its immediate grantors. *Moore v. Duran* and *Glenn v. Shuey, supra.*

The question remains as to whether the Delanceys adversely possessed the disputed portion of the property. Appellant asserts that such possession existed because the Delanceys farmed the land and fenced it in. Contrary to appellant's assessment, there was absolutely no evidence demonstrating that the disputed portion of the land was actually enclosed or cultivated by the Delanceys for a continuous period of twenty-one years.

There was evidence that the Delanceys farmed and dwelt upon the undisputed or southern portion of the former Sells tract which contains approximately sixty acres. *See, e.g.*, N.T. 9/28/95 at 69 (indicating that the farmhouse and buildings were on the non-disputed portion of the property and that the non-disputed part of the land was farmed); Plaintiff's Exhibit 25 and 26 (photographs depicting the Delancey's abandoned farmhouse and barn) and Exhibit 32, at 208 (Testimony of Max Kneidinger, indicating that his family farmed the fields located at the southeastern part of the Delancey farm). However, the activities of the Delancey family on the southern part of the land is irrelevant because appellant's title to and right to possess this portion of the property is uncontested. We will therefore focus solely upon the activities relating to the remainder of the tract which are in dispute.

With regard to this issue, we note that there was some evidence that the Kneidinger family leased and farmed the disputed part of the Delancey tract from approximately 1940 until appellee purchased the property and began cultivating it. *See* Plaintiff's Exhibit 32, at 207-208 and 211. However, the record reflects that the disputed parcel was also included as

part of the tract of land owned by the Baker family. *See* Plaintiff's Exhibit 31 (deed conveying the former Allen and Porter tracts to Elias Baker). The property remained in the Baker family until 1936, when it was bought by the county as a result of a tax sale. *See* Exhibit 14A (commissioners's deed and deed poll). Appellee's grantors, Paul Walker and other individuals bought the land in 1946 from the county trustee. *See id.* (deed from trustee to appellee's grantors).

Appellee acquired the land in 1948 and 1949 from Walker and the other grantors. *See* Defendant's Exhibit 14, at paragraph 2 (Abstract of Title) and Exhibit 14A (deeds from appellee's grantors to appellee). Appellee began cultivating the land in 1950. N.T. 9/28/95 at 121-123; Defendant's Exhibit 13B (minutes of Brush Mountain's meeting held on January 15, 1950, indicating that Brush Mountain had entered into a contract with the state game commission regarding cultivation of food plots in the disputed area). Appellee's members also strung wire fencing in the area at approximately the same time. N.T. 9/28/95 at 123; Defendant's Exhibit 13A (minutes of Brush Mountain's meeting held in 1949, indicating that their property was to be inclosed with wire). Appellee thereafter continued to plant and maintain the area for use in its activities. *See, e.g.*, N.T. 9/28/95 at 74-77, 79-81, 85-86; Defendant's Exhibits 11 and 12 (Brush Mountain's contracts with the state game commission regarding cultivation of food plots, respectively dated May 13, 1961 and August 2, 1976).

The events which transpired prior to the county's acquisition of the property in 1936 are irrelevant. If the Delanceys had acquired title to the property by adverse possession or otherwise before 1936, it was incumbent upon them to challenge the tax sale or redeem the land. It does not appear that the land was redeemed or that the validity of the sale was otherwise questioned within the pertinent statutory period. Accordingly, the sale was valid. 72 P.S. §5971q, *repealed in part*

by 72 P.S. §5860.801. The effect of the sale was to discharge all prior liens or claims against the land, 72 P.S. §5971i, *repealed in part by* 72 P.S. §5860.801, and vest fee simple title to the property in appellee's grantor. *Id.*, 72 P.S. §5971n, *repealed in part by* 72 P.S. §5860.801.[7] The tax sale thus invalidated any claim which the Delanceys might have had to the property prior to 1936 by adverse possession or otherwise.

Adverse possession does not lie against land held by the county in connection with a tax sale. *Torch v. Constantino*, 227 Pa. Super. 427, 433, 323 A.2d 278, 281 (1974). Appellant therefore cannot rely upon the activities of the Delanceys or their lessees during the period in which it was owned by the county, *i.e.*, from 1936 to 1946, to establish adverse possession. With regard to the post-tax sale conduct of the Delancey family or their lessees, the record discloses that their activities upon the disputed part of the land were not continued for a period of twenty-one years. Because it is plain that appellant and/or its predecessors have not demonstrated continuous and uninterrupted possession of the land for a period of twenty-one years following the tax sale, appellant's adverse possession claim must fail.

Appellant next contends that the trial court erred in denying his petition seeking permission to notify neighboring landowners of the suit so that they could intervene. Appellant again fails to support its position with citation to any pertinent legal authority in contravention of Pa.R.A.P., Rule 2119, 42 Pa.C.S.A. Accordingly, this issue has been waived. *Bunt v. Pension Mortgage Associates, Inc., supra.* In any event, this claim is wholly meritless.

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[7] The repeal only applies to taxing districts operating under the Real Estate Tax Sale Law, 72 P.S. §5860.101-§5860.803. This law did not go into effect until January 1, 1948. 72 P.S. §5860.803. Accordingly, the tax sale in this case was not subject to the Real Estate Tax Sale Law.

The instant action only involves title to the northern portion of the former Sells tract, containing approximately forty acres. Title to the remaining acreage is not in dispute. Title of the part of the land encompassed within the former Allen tract is likewise uncontested. None of the persons cited by appellant in its brief has any connection with the forty acres that form the subject of this litigation. Rather, these individuals or entities all own property which falls within either the undisputed portion of the Sells tract or the Allen tract. The parties referenced by appellant therefore have no legally enforceable interest which is affected by the trial court's disposition of this case. Under these circumstances, there is no basis on which these individuals could intervene. *See* Pa.R.C.P., Rule 2326, 42 Pa.C.S.A. (enumerating the instances in which a person who is not a party to an action shall be permitted to intervene therein).

Appellant has nonetheless attempted to create an issue by asserting that it may have some claim to a portion of William Allen's land and by casting doubt upon the title to the sixty acres of the Sells tract which are not in dispute. Appellant's arguments are ludicrous. More than 200 years have passed since John Canan surveyed these tracts. The time for challenging the accuracy of the surveys and establishing a claim to the land expired long ago. As a result, any claim to Allen's land has been abandoned by Sells and his successors. With regard to the uncontested part of the Sells tract, it is evident that Sells or his successors acquired title to the land by adverse possession. Therefore, no cloud upon the title of either Allen's or Sells' successors could exist. Viewed in this manner, there is clearly no reason to involve the owners of the undisputed lands in the instant litigation.

Appellant's fourth assertion of error implicates Judge Callan's reference to certain factual findings made by Judge O'Kicki during the previous adjudication of appellant's quiet

title action. Appellant contends that Judge Callan's references violated this court's prior decision regarding application of res judicata. Notwithstanding appellant's belief to the contrary, Judge Callan applied neither the doctrine of res judicata nor collateral estoppel. It instead appears that Judge Callan believed that he was bound by Judge O'Kicki's factual findings under the coordinate jurisdiction rule. *See* N.T. 9/28/95 at 238 and 241. Pursuant to this doctrine, "judges of coordinate jurisdictions sitting in the same court and in the same case should not overrule the decisions of each other." *Okkerse v. Howe*, 521 Pa. 509, 516, 556 A.2d 827, 831 (1989).

As applied here, Judge Callan's application of the coordinate jurisdiction rule was improper because the instant declaratory judgment action did not, as previously determined by this court, constitute the same case as appellant's quiet title action. Consequently, the trial court was not bound by Judge O'Kicki's factual findings. Despite the trial court's misconception regarding to the applicability of the coordinate jurisdiction rule, the error was harmless.

The trial court made two specific references to the alleged factual findings made by the prior judge in the quiet title action. *See* Adjudication and Decree Nisi, filed 2/22/96, at paragraphs 45 and 46. These findings related to appellant's inability to prove its right to relief based on either its superior record title or adverse possession. *Id.* Judge Callan further found that the evidence presented by appellant did not justify a departure from the Judge O'Kicki's findings. *Id.* at paragraph 50.

As previously discussed, appellant has failed to prove either that it has superior record title to the land or that it has acquired title by adverse possession. It is thus clear that the trial judge's findings and conclusions were correct, even if premised on the mistaken application of the coordinate juris-

diction rule. Because the trial court's error had no effect upon the outcome of this case, the error must be deemed harmless. *See, e.g., Snyder v. Gravell,* 446 Pa. Super. 124, 128, 666 A.2d 341, 343 (1995), *allocatur denied,* 544 Pa. 676, 678 A.2d 366 (1996) (error which had no impact on the decision of the case was harmless).

Appellant's penultimate challenge relates to the trial court's alleged denial of oral argument and refusal to allow appellant to file a reply brief. These issues were not raised in appellant's post-trial motions and are therefore waived. *See* Pa.R.C.P., Rule 227.1(b), 42 Pa.C.S.A. (grounds not specified in post-trial motions are deemed waived) and Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A. (issues not raised in the lower court are waived and cannot be raised for the first time on appeal). Even were we to consider these issues, no relief would be due.

Appellant cites Pa.R.C.P., Rule 211, 42 Pa.C.S.A. in support of his right to engage in oral argument. However, this rule only governs oral argument of motions. Appellant is not complaining of the abridgement of its right to orally argue a motion. Rather, appellant believes that it had a right to engage in oral argument in support of its position following trial upon the filing of its memorandum of law and proposed findings of fact. *See* Appellant's Brief at 42-43.

There is no authority which grants a party the right to oral argument after trial. Nor has appellant referred us to any authority which so requires. The fundamental purpose of a trial is to allow the parties to present evidence in support of their respective positions. As part of the trial process, parties are accorded the right to engage in closing argument. *See* Pa.R.C.P., Rule 1516 (the parties shall be prepared to argue the case immediately after the close of the evidence) and Rule 1601(a) (practice and procedure in a declaratory judgment action shall follow, as nearly as may be, the rules governing the

action in equity), 42 Pa.C.S.A. Appellant was accorded this right here but declined to make a closing argument. N.T. 12/27/95 at 139. Having failed to avail itself of the rights provided in the rules, appellant will not now be heard to complain.

In any event, oral argument would not have been of material benefit. The issues to be decided were not unduly complex. Each party asserted title to the land. In addition, appellant suggested that if record title was lacking, it had acquired title by adverse possession. The trial court had before it ample evidence on which to resolve these questions, which included the exhibits and testimony introduced at trial as well as the parties' briefs. Under these circumstances, we are unable to comprehend the manner in which oral argument would have enhanced the evidence before the court or altered the court's understanding thereof so as to have persuaded the court to render a decision in appellant's favor. *See Gerace v. Holmes Protection of Philadelphia,* 357 Pa. Super. 467, 475, 516 A.2d 354, 359 (1986), *allocatur denied,* 515 Pa. 580, 527 A.2d 541 (1987) (plaintiff was not prejudiced by the denial of oral argument since the record presented to the trial court was extensive and oral argument would not have in any way enhanced or altered the materials presented to the court).

A similar conclusion is reached in connection with the denial of appellant's request to file a reply brief. Appellant references Pa.R.A.P., Rule 2185(a), 42 Pa.C.S.A. in support of his position. However, Rule 2185 is a rule of appellate procedure which only applies to the filing of reply briefs in the appellate courts. It has no applicability whatsoever to briefing requirements in the courts of common pleas.

Briefing requirements are covered, if at all, either by the Pennsylvania Rules of Civil Procedure or the local rules of

court.[8] Although Pa.R.C.P., Rule 210, 42 Pa.C.S.A. addresses the issue of briefs, the rule is silent on the subject of reply briefs, and merely requires that briefs be endorsed with the name of the case, the court, term and number and name and address of the attorney. Rule 1516, *supra,* is similarly unavailing as it prohibits the parties from filing findings of fact and conclusions of law except by leave of court. The rule thus makes it clear that the filing of trial memoranda is a matter to be exclusively decided by the trial judge.

The trial court was in the best position to determine the necessity and scope of the parties' briefs. In this case, the trial judge explicitly requested proposed findings of fact, conclusions of law and a discussion of the pertinent caselaw from the parties as to their respective positions and other additional issues. N.T. 12/27/97 at 136-139. The judge further stated that there were to be no supplemental briefs and that the parties would not be permitted to reargue or raise additional matters not covered by their briefs. *Id.* at 136-137 and 138. Appellant's counsel indicated that he understood this directive. *Id.* at 139.

Appellant has not explained how a reply brief would have been of material benefit, aside from vague allusions to the correction of alleged errors in appellee's brief. If errors were indeed made by appellee and adopted by the trial court, appellant had the opportunity to rectify them in his post-trial motions. Moreover, appellant had the opportunity to discuss the evidence and applicable law in his own brief, thereby negating any possible misapprehension of the facts or law supplied by appellees.

The trial court accorded both parties equal opportunity to fully articulate their respective positions. Given the issues

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[8] Appellant has not referenced the applicable Blair County rules, if any. As appellant's claim is not based on a violation of the Blair County procedural rules, this issue is not properly before this court and will not be further discussed.

involved, there was no compelling reason or need for the filing of supplementary materials by the parties. Hence, no relief is due on this ground.

Appellant finally asserts that appellee is estopped from asserting title pursuant to the language contained in one of its predecessor's deeds. While appellant's recitation of the law on this point may be accurate, it ignores the effect of the tax sale. As previously discussed, the disputed land was a part of the property acquired by the county following the tax sale. The sale was valid because the property was neither redeemed nor otherwise challenged. The effect of the tax sale was to discharge any prior liens or claims and convey fee simple title to the purchaser, *i.e.*, appellee's predecessors in title, who subsequently conveyed the land to appellee. Under these circumstances, appellee is not estopped from asserting title to the property. Finding no error or abuse of discretion necessitating the grant of any relief, we affirm.

Decree affirmed.

APPENDIX B

The Superior Court of Pennsylvania
Office of the Prothonotary
1015 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 565-7592
David A. Szewczak, Esquire, Prothonotary
Eleanor R. Valecko, Deputy Prothonotary

September 4, 1997

Wilbert Beachy, Esquire
110 East Union Street
P.O. Box 863
Somerset, PA 15501

IN RE: FRED YOUNG V BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION
NO. 659 PITTSBURGH 1996

Dear Mr. Beachy:

The court has entered the following order on your Application for Reargument filed in the above captioned matter.

"ORDER OF COURT

The court hereby denies the application filed July 8, 1997 requesting reargument or reconsideration of the decision dated June 24, 1997.

DATE: September 4, 1997

PER CURIAM"

Very truly yours,
/s/Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV/ksj

cc: T. Dean Lower, Esquire
M. David Halpern, Esquire

APPENDIX C

THE COURT OF COMMON PLEAS
BLAIR COUNTY, PENNSYLVANIA
91 CP 000392
CIVIL ACTION—LAW

FRED E. YOUNG, INC., Plaintiff
v.
BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION
Defendant

Norman D. Callan, Judge
T. Dean Lower, Esquire, Attorney for Plaintiff
M. David Halpern, Esquire, Attorney for Defendants

ADJUDICATION

This Declaratory Judgment action arises as a result of conflicting claims of the parties to ownership of a 40-acre parcel of property. The Plaintiff asserts that the disputed 40-acre tract is part of a 101-acre parcel to which it acquired title by a 1965 deed. The Plaintiff, shortly after the deed was recorded, started an action to quiet title (see 101 March term 1966). Said action was denied by Order dated June 10, 1981, and exceptions to that Order were dismissed on October 6, 1986.

The Plaintiff commenced this action for declaratory judgment in February, 1991. The Order of Court which sustained the Defendant's Preliminary Objections was reversed by the Superior Court (see Opinion and Order, August 20, 1992, No.

2000 Pittsburgh, 1991). The trial by Court was held on September 27 and 28, and December 27, 1995. Briefs were to be filed thirty (30) days after the testimony concluded.

ISSUE

WHO IS THE OWNER OF THE DISPUTED 40-ACRE TRACT OF PROPERTY?

FINDINGS OF FACT

1.

On July 28, 1766, John Baynton and Samuel Wharton were issued warrants for five tracts of land in Frankstown Township, Cumberland County.

2.

The five tracts warranted to Baynton and Wharton (later the London Company) adjoin to form one large parcel of land, the Northeast boundary of which forms a straight line along the foot of Brush Mountain.

3.

On March 14, 1786, Ludwick Sells was issued a warrant for 100 acres of land in Frankstown Township, Bedford County. No mention is made of improvements; interest is to commence with the date of the warrant.

4.

Bedford County was created on March 9, 1771, from part of Cumberland County. (See Pa. Manual Vol. III, p. 6-14).

5.

On May 29, 1793, Daniel Fetter(s) was issued a warrant for 100 aces of land in Frankstown Township, Huntingdon County. The warrant includes two small runs. No mention is made of improvements; interest is to commence with the date of the warrant.

6.

Huntingdon County was created on September 20, 1787, from part Bedford County. (See Pa. Manual Vol. III, p. 6-27).

7.

On February 1, 1794, warrants for 400 acres each, in Allegheny Township, Huntingdon County, were issued to John Long, James Smith, Daniel Hurley, and William McAdams. No mention is made of improvements; interest is to commence with the date of the warrant.

8.

In June, 1794, John Canan surveyed the four tracts of land warranted to Long, Smith, Hurley and McAdams. Some errors were corrected in June, 1801. The four surveys adjoin one another and run generally from North to South along the Western side of Brush Mountain.

9.

The surveys for Long, Smith, Hurley, and McAdams form the Northeast boundaries of what later became the Allen, Fetter, and Porter Tracts. The Long, Smith, and Hurley Surveys name William Allen as an adjoiner on the Northwest. The Hurley Survey also names Michael Fetter as an adjoiner on the Northwest. The McAdams Survey names John Parker (Porter) as an adjoiner on the Northwest.

10.

On October 24, 1794, John Canan surveyed the Sells Tract. The Sells Survey names William Allen (Allon), Michael Fetter, and the London Land as adjoiners. This survey shows two streams and measures 325 perches by 55 perches.

11.

On July 6, 1795, a warrant for 400 acres was issued to John Porter for land in Allegheny Township, Huntingdon County.

The tract adjoins John Davison (David) on the Southwest and the London Company on the North. The warrant includes an improvement and requires Porter to pay interest from September 1, 1792.

12.

On November 3, 1795, John Canan surveyed the Porter Tract. The Porter Survey names Bald Eagle Mountain, Michael Fetter(s), John David's Claim, and the London Land as adjoiners. The Porter Survey forms a rectangle and measures 231 perches by 294 perches. There are five streams depicted on the survey.

13.

On November 3, 1795, John Canon surveyed the Fetter Tract. The Fetter Survey names William Allen (Allon), Turners, John Porter, and the London Land as adjoiners. The Fetter Survey forms a rectangle and measures 231 perches by 76 perches. There is one stream depicted on this survey.

14.

The Fetter Survey shows "Daniel Michael Fetter" as the owner of the land; the name "Michael" has been crossed out and replaced with the name "Daniel." (The Fetter Warrant is in the name of "Daniel" Fetter). The Name "Michael Fetter" appears (without any correction) as an adjoiner on the Sells, Porter, and Hurley Surveys.

15.

Michael Fetter, Jr., was an early resident of Frankstown (later known as Allegheny and then Antis) Township, Huntingdon County. He was assessed in 1788 for 100 acres that was "held by improvements." It is likely that Daniel Fetter obtained a warrant for the same 100 acres that Michael Fetter (Jr.) held by improvement. This would account far the name-change on the "Daniel Michael Fetter" survey and the naming

of "Michael Fetter" as an adjoiner on the Sells, Porter, and Hurley Surveys.

16.

On February 3, 1796, a warrant for 400 acres was issued to William Allen for land in Allegheny Township, Huntingdon County. The tract adjoins the London land on the East and Brushy Ridge on the South and includes two small runs. The warrant includes an improvement and requires Allen to pay interest from June 1, 1792.

17.

On December 25, 1796, John Canon surveyed the Allen Tract. The Allen Survey names Baynton and Wharton, Turner & Company, Brushy Ridge and John Porter as adjoiners. The Allen Survey does not form a rectangle; it measures 401 perches on the Northwest, 231 perches on the Southwest, 422 perches on the Southeast and 100 perches on the Northeast. There are three streams depicted on this survey.

18.

The sum of the distance along the Northwest boundary of the Sells and Fetter Surveys (325 perches and 76 perches) equals the distance along the Northwest boundary of the Allen Survey (401 perches).

19.

The extreme Northwest corner of the Allen Survey and the Sells Survey is marked by a gum tree. The corresponding corners of the John Long Survey and the Martin Bell Survey are also marked by a gum tree. An examination of the 17 individual surveys that make up the 1967 connected draft (Plaintiff's Exhibit #2; Defendant's Exhibit #5) reveals that this particular corner (on the Long, Bell, Allen, and Sells Surveys) is the only point identified by a gum tree.

20.

The two streams on the Sells Survey match two of the streams on the Allen Survey (See Defendant's Exhibit #4, #21; Plaintiff's Exhibits #4a-#5). An overlay of the respective surveys shows that the location of these streams corresponds almost exactly. (Defendant's Exhibit #21). If the Sells and/or Fetter Surveys are placed at any other location along the line of the London land (Baynton and Wharton), no such match occurs.

21.

John Canan originally surveyed eight of the seventeen tracts referred to in the 1967 connected Draft (Plaintiff's Exhibit #2; Defendant's Exhibit #5): Long, Smith, Hurley, McAdams, Sells, Fetter, Porter, and Allen. The Allen Survey was the last of the eight surveys to be recorded (December 25, 1796). No interference was created among the first seven of these surveys (excluding Allen).

22.

The William Allen Survey, recorded on December 25, 1796, results in an interference with both the Sells and Fetter Surveys. The William Allen Survey includes and completely overlays both the Sells and Fetter Surveys (except for one small triangle of land at the Southeast end of the Fetter Tract; see Defendant's Exhibit #21).

23.

The Hurley and McAdams Tracts were originally surveyed by John Canan in June, 1794. More than fifty years later on February 9, 1852, the Hurley and McAdams Tracts were resurveyed for Martin Bell, pursuant to an Order dated January 22, 1852. The shapes (including the metes and bounds descriptions, calls and adjoiners) of the respective resurveys of the Hurley and McAdams Tracts are completely different from

the original surveys (although they are approximately the same size).

24.

Blair County was created on February 26, 1846, from parts of Huntingdon and Bedford Counties. (See Pa. Manual Vol. III p. 6-15).

25.

The remaining tracts that are included on the 1967 connected draft (Plaintiff's Exhibit #2; Defendant's Exhibit #5) (for Jacob Ake, David Bell, David Johnston, Andrew Boyle, and Martin Bell) were all surveyed many years (1819 through 1857) after the eight surveys by John Canan.

26.

All of the surveys referred to in the 1967 connected draft, that are dated after John Canan made his eight surveys, were filed by individuals who had the benefit of information that was not available during the 1790's. Such hindsight would include the eight surveys made by John Canan.

27.

The land occupied by Ludwick Sells and/or his successors in title, also referred to as the "Delancey Farm" is not the land described by the Ludwick Sells Survey, dated October 24, 1794.

28.

The land occupied by Ludwick Sells and/or his successors in title appears not to be located where the Ludwick Sells Survey was to be located.

29.

The reference to the tracts of land that adjoin the "Delancey Farm" in various deeds, does not reflect the location of the Ludwick Sells tract as surveyed but only reflects

where Ludwick Sells and/or his successors claimed it to be or where they actually settled.

30.

The land to the Southwest of the Porter Survey was identified as "John David's Claim." John David did not obtain a warrant for this land or record a survey. Part of "John David's Claim" was surveyed for David Bell August 26, 1838, pursuant to a warrant dated June 11, 1838; no interference resulted, because "John David's Claim" was not previously warranted, surveyed, or patented.

31.

The remainder of "John David's Claim" (about sixty-six acres) was occupied by Ludwick Sells and/or his successors in title and was later known as the "Delancey Farm;" no interference resulted because "John David's Claim" was not previously warranted, surveyed, or patented.

32.

Plaintiff's title to the aforesaid sixty-six acres does not include an accurate survey and patent because the Sells Survey, dated October 24, 1794, and the corresponding Patent dated September 2, 1834, both describe a tract of land that lies to the Northeast of both the Porter and Fetter Surveys and within the bounds of the William Allen Survey, dated December 25, 1796.

33.

When Ludwick Sells and/or his successors in title occupied approximately sixty-six acres of "John David's Claim" they needed an additional forty acres to match the 106 acres described by the Sells Survey, dated October 24, 1794. If this additional forty acres is positioned to the Northeast of "John David's Claim," an interference with the John Porter Survey would result.

34.

No evidence has been introduced as to why, how, or when Ludwick Sells and/or his successors in title first located in the land later known as the "Delancey Farm."

35.

Until 1897, the deeds in Plaintiff's chain of title continued to refer to the same metes and bounds description (including adjoiners William Allen and Michael Fetter), that was first used in the Sells Survey, dated October 24, 1794.

36.

The John Porter Survey, dated November 3, 1795, was the first survey to accurately describe the forty acres that are the object of this action. The fact that the Plaintiff's predecessors in title may have later claimed the disputed forty acres does not establish that their survey was the first to accurately describe those forty acres.

37.

No evidence has been presented as to why neither Ludwick Sells or Daniel Fetter ever challenged the validity and/or accuracy of the William Allen Survey, dated December 25, 1696 [sic]. Sells and/or Fetter may have abandoned or sold their land; however no such records have been presented.

38.

The deed from Robert and Mary Allison to Robert Nelson refers to an interference with prior survey(s). This deed does not describe the nature of the interference, either by quantity or location. It would be pure speculation to read anything further into this legal description.

39.

The balance of the Porter Tract remaining after a non-measured and non-defined interference is removed would be the entire Porter Tract (400 acres and 69 perches).

40.

The right-of-way that was given by the Baker Family to the Juniata Water and Power Company in 1907, or any of the subsequent grants to utility companies, have no bearing on who recorded the first valid survey to accurately describe the disputed forty acres.

41.

There is no deed or other recorded instrument by which Defendant specifically conveyed the forty acres to any other party, including the Plaintiff and its predecessors in title. The fact that a right-of-way survey names the Delancey Family as an adjoiner in the vicinity of the disputed forty acres does not convey record or any other title of those forty acres from Defendant's predecessors in title to the Delancey Family.

42.

Contrary to the Plaintiff's assertion that there has been a Court determination of the location of the Ludwick Sells tract, the Order of Court dated October 25, 1853, authorized the sale of the land of Anna Decker, adjudged a lunatic. Such authorization is no more than permission to sell a lunatic's property. It is not a court determination as to the amount of land or the location of the land. Such an Order does not create or establish a claim; it allows the claimed land to be sold.

43.

Fred E. Young, Inc., the Plaintiff is the successor in interest to the Delancey heirs.

44.

Brush Mountain Sportsmen's Association, the Defendant, purchased the John Porter tract in 1946 and has used the land in question since the early 1950's until the present.

45.

Judge O'Kicki, in his Opinion dated June 10, 1981, determined that the Plaintiff did not meet its burden of proof to establish the elements of adverse possession for the disputed forty acres.

46.

Judge O'Kicki, in his Opinion dated June 10, 1981, determined that Plaintiff was unable to establish the location of its land by means of an accurate warrant and survey and that the facts presented did not indicate any interference between the Sells and Porter Surveys.

47.

Attorney Levine, as an expert, opined that the Defendant has superior title to the disputed forty acres because John Porter was the first and only person to receive a warrant and record a valid survey that accurately describes and includes the disputed forty acres.

48.

William Saylor, R.S., testified as an expert on behalf of the Defendant. Mr. Saylor testified as to the time chart (Defendant's Exhibit #20) and the positioning of the eight tracts of land surveyed by John Canan (Defendant's Exhibit #21).

49.

Attorney Levine and Mr. Saylor were credible witnesses. The testimony and opinions they expressed were credible.

50.

The Plaintiff failed to offer new or additional evidence as to its claims of record title and adverse possession which would allow this Court to make findings contrary to those in Judge O'Kicki's Opinion.

DISCUSSION

As the Superior Court has indicated, declaratory judgments are judicial searchlights, switched on at the behest of a litigant to illuminate an existing legal right, status, or other relation. *Doe v. Johns-Manville Corp.*, 324 Pa. Super. 469, 471 A.2d 1252 (1984). In this case, the legal right to be illuminated is that of title to the disputed forty acre parcel of real estate.

It is well established that the credibility of the testimony and of the witness is for the finder of fact. *Kelly v. Prudential Ins. Co.*, 334 Pa. 143, 6 A.2d 55 (1939); *Leming v. Carlisle Motor Sales, Inc.*, 200 Pa. Super. 282, 189 A.2d 307 (1963).

In Pennsylvania, the warrant and survey were, for many years, the origin of title to public lands. A warrant and survey, returned with the purchase money and accepted by the Commonwealth, conferred perfect title against all the world. *Consolidation Coal Co. v. Friedline*, 134 Pa. Super. 1, 3 A.2d 200 (1938). The Commonwealth retained legal title, but only as security for the patenting fees. The patent itself gave the owner, "as to all third persons ... no better title than he had before." *Id.* at 4. Attorney Levine stated that in his opinion, the first party to record a valid survey for a given tract of land would have superior title, and that in the event of an interference, the first survey to be recorded would control. Attorney Levine stated that one of the reasons for recording a survey was to give notice to the world that someone other than the Commonwealth was claiming title to a certain tract of public land. Attorney Levine added that in order to have any validity, the survey must accurately describe the land in question. In

the event of an ambiguity in the description, the identity and location of the land are questions for the fact finder. *Krepps v. Carlisle*, 157 Pa. 358, 27 A. 741 (1893).

Plaintiff and Defendant both claim to be the de jure owner of the disputed tract of forty acres, in Logan and/or Antis Townships, Blair County. Both parties have based their claim in part on paper title. The origin of Plaintiff's title is alleged to be a tract of land warranted and surveyed to Ludwick Sells. The origin of Defendant's title is a tract of land warranted and surveyed to John Porter. Plaintiff alleges that it has superior title because the Ludwick Sells Survey, dated October 24, 1794, was recorded prior to the John Porter Survey, dated November 3, 1795. Defendant avers that it has superior title because the John Porter Survey was the first and only survey to include and describe the disputed forty acres and further, because the Ludwick Sells Survey does not describe or include the disputed forty acre plot.

Attorney Levine expressed his opinion that public lands in Pennsylvania could be acquired by two methods: one is by settlement and improvement, and the other is by warrant and survey. Either mode of acquisition always required "due diligence" to perfect the right. *Parshall v. Jones*, 55 Pa. 153 (1867). In order to acquire title by settlement and improvement, the settler had to enter upon and clear the land, establish a residence, and raise crops so as to support a family. *Broad Top Coal & Iron Co., v. Riddlesburg Coal & Iron Co.*, 65 PA. 435 (1870). A proper settlement could only be made on vacant, unimproved land. Rights established by a settler could be subsequently lost by an abandonment of the land, which required an actual relinquishment of possession, without the intention of returning. *Miller v. Cresson*, 3 Watts & S.284 (1843). The settlement could only be "interrupted by the enemy, or by going into the military service of this country during the [Revolutionary] war." 64 P.S. § 66.

Attorney Levine testified that during the late 1700's, the time period relevant to the present case, ownership rights were being established in what is now Blair County by the settlement and improvement method. Many of these early settlers did not have warrants for their land. In 1788, in what was then Frankstown Township, Huntingdon County, Michael Fetter was assessed for 100 acres "held by improvements" (Defendant's Exhibit #3). Some of the settlers who held their land by improvements later applied for a warrant. The William Allen Warrant, dated February 3, 1776, [sic] (Defendant's Exhibit #2) and the John Porter Warrant, dated July 6, 1795 (Defendant's Exhibit #27) both make reference to an "improvement" and both provide for the accrual of "interest" from the time said improvements were first made. 64 P.S. § 63. The property rights of settlers without both a warrant and a returned survey were recognized so long as there was a valid settlement with improvements. Hence, Michael Fetter and William Allen are listed as adjoiners on the Sells Survey, which was filed October 24, 1794, (Plaintiff's Exhibit #5).

Attorney Levine discussed the second method of acquiring public land, which was to obtain a warrant and survey. The land office was prohibited from issuing a warrant "for any tract of land on which a settlement is made, unless to such person or persons, respectively, who have made the settlement, or their legal representatives." 64 P.S. § 65. A valid warrant could be issued only to individuals, and was not to exceed four hundred acres. 64 P.S. § 64. The applicant for a warrant was required to provide "a particular description of the lands applied for, ... specifying whether said land be improved or not, and, if improved, how long since said improvement was made, that interest may be charged accordingly." 64 P.S. § 63. As noted, some of the applicants had already made improvements to their land. Mr. Saylor indicated in his testimony that the statutes relating to the lands within the "Old Purchase" did not

specifically require that the warrant holder establish a homestead. See 64 P.S. § 61-70. John Porter's Warrant, dated July 6, 1795, (Defendant's Exhibit #27) mentions an improvement and that interest was to commence on September 1, 1792. Ludwick Sells' Warrant dated March 14, 1786, (Plaintiff's Exhibit #4), mentions no improvement and that interest is to commence as of the date of the warrant. Attorney Levine stated that upon payment of a nominal fee, the warrant holder was entitled to survey the tract of land that was described by the warrant. A Deputy Surveyor, appointed by the Pennsylvania Surveyor General, was given the responsibility and authority to go upon and measure the land, and to mark the lines. 64 P.S. § 102. During the late 1700's, John Canan was the Deputy Surveyor for the district that covered what is now Blair and Huntingdon Counties. Mr. Saylor pointed out that John Canan recorded surveys for eight of the seventeen warrant holders (Long, Smith, Hurley, McAdams, Sells, Fetter, Porter, and Allen) named on the 1967 connected draft (Plaintiff's Exhibit #2; Defendant's Exhibit #5). Mr. Saylor observed that none of the eight surveys made and recorded by John Canan, on its face, mentions any interference (See Defendant's Exhibit #19).

Attorney Levine testified that after the Deputy Surveyor filed the completed survey with the State Land Office, 64 P.S. § 381, the warrant holder (or his successors) had the right to apply for a patent from the Commonwealth. Attorney Levine noted that no patent was ever issued for the Long, Smith, Hurley (original), McAdams (original), or Fetter Surveys. Attorney Levine expressed his opinion that the re-drawn surveys of Hurley and McAdams, dated February 9, 1852, as well as the respective patents issued therefore, were irrelevant to the present dispute. Separate patents were issued for the Sells (September 12, 1834), Porter (March 24, 1800) and Allen (June 21, 1808) Tracts. Plaintiff alleges that there is an inter-

ference between Sells and Porter; Defendant avers that there is an interference between Sells and Allen. Assuming that at least one of these averments is true, the Commonwealth of Pennsylvania issued two patents which describe and include the disputed forty acres. Attorney Levine averred that this issue becomes important in light of fact that the date of the patent does not control superiority of title. The patent gave the warrant holder (or his successors) no better title than he had before; it merely passed legal title out of the Commonwealth and perfected and confirmed the title already held by means of the warrant and the survey. *Consolidation Coal Co. v. Friedline,* 134 Pa. Super. 1, 3 A.2d 200 (1939).

Plaintiff purchased a tract of land known as the "Delancey Farm" and bases its title on the Sells Survey. Plaintiff contends that the disputed forty acres is part of the "Delancey Farm" and that the date of the Sells Survey gives it superior title. Attorney Levine did not dispute that the Plaintiff purchased the "Delancey Farm." However, Attorney Levine rejected Plaintiff's averments that the Sells Survey describes the "Delancey Farm" and/or includes any part of the disputed forty acres. According to Attorney Levine and Mr. Saylor, the Sells Survey, dated October 24, 1794, specifically describes 106 acres of land that lies to the Northeast of the Fetter tract, while the Porter Survey, dated November 3, 1795, specifically describes 400 acres of land that lies to the Southwest of the Fetter tract. Both of the Defendant's experts agreed that there is no interference created as between the two surveys. When Sells filed his survey, John Porter had already settled on his land. The Sells Warrant, dated March 14, 1786, mentions no interest or improvements; there is no evidence that Ludwick Sells settled on the land described by his survey. Attorney Levine testified that the fact that Ludwick Sells and/or his successors may have later located on the tract of land now known as the "Delancey Farm" does not change the descrip-

tion or location of the Sells Survey. Attorney Levine opined that the Defendant had superior title to the disputed forty acres because John Porter was the first and only person to receive a warrant and record a valid survey that accurately describes and includes the disputed forty acres.

The Plaintiff and the Defendant have asserted alternative claims based upon adverse possession. It is well established that one who claims title by adverse possession must prove that he has had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years. *Conneaut Lake Park, Inc., v. Klingensmith*, 362 Pa. 592, 66 A.2d 828 (1949). The party seeking to prove adverse possession must prove its claim "by credible, clear, and definitive proof." *Stevenson v. Stein*, 412 Pa. 478, 195 A.2d 268 (1963).

The Plaintiff's claim as to adverse possession has already been denied. No additional credible evidence as to this claim has been presented. Based upon the Findings of Fact as set forth, it is not necessary to reach the Defendant's adverse possession claim.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction in this matter.

2.

The Plaintiff has failed to establish by a preponderance of the evidence the location of his land by reference to the Ludwig [sic] Sells Land Warrant and Survey which relied upon the presentation of his case.

3.

In order for an earlier survey to the [sic] given priority over a later survey, there must be an interference as between those two surveys. There was no interference between the Sells Survey and Porter Survey.

4.

A chain of title for a given tract of land (the "Delancey Farm") that was mistakenly occupied by a warrant holder and/or his successors in title cannot begin with a survey (Sells Survey) that describes a different tract of land.

5.

The Defendant has established by a preponderance of the evidence the location of his land by reference to the John Porter Land Warrant and Survey, as well as the adjoiners, which he relied upon in the presentation of his case.

6.

The Defendant has superior title to the disputed forty acres because John Porter was the first and only person to receive a warrant and record a valid survey that accurately describes and includes the disputed forty acres.

7.

With respect to the Plaintiff's reliance on the elements of adverse possession, he has failed to show that there has been persistent and continual adverse use for at least twenty-one years.

8.

The Plaintiff has failed to produce any evidence that the use that did occur was not permissive or that such use was hostile to the true owner.

9.

The Plaintiff sought to tack the uses of prior predecessors in land without having shown any use exercised by himself on said land. He is not a user and cannot tack the uses of the land, if any, by others who may have been predecessors in title.

10.

Title to the disputed forty acres as set forth in the Porter Survey is and has been in the Defendant and his predecessors in title.

11.

The Plaintiffs have no interest in the subject disputed forty acres of land.

In light of the foregoing findings and conclusions, the following is deemed to be appropriate:

DECREE NISI

AND NOW, this 21 day of February, 1996, it is, ORDERED, DIRECTED, AND DECREED NISI that:

1.

Title to the disputed forty acres as set forth in the Porter Survey, more fully described in the Deed into the Defendant, is and has been in the Defendant and his predecessors in title.

2.

The Plaintiff has no legal or equitable interest in the subject disputed forty acres of land.

IT IS FURTHER ORDERED, DIRECTED, AND DECREED that this Decree Nisi shall become the Final Decree in this case unless exceptions are filed to said Decree Nisi within ten (10) days following the date of this Order.

The Prothonotary of this Court shall provide notice of the filing of this Decree Nisi as mandated by Pennsylvania Rule of Civil Procedure No. 1517.

BY THE COURT:
/s/Norman D. Callan
J.

kl

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 648 Western District

Allocatur Docket 1997

Petition for Allowance of Appeal from Superior Court

FRED E. YOUNG, INC., Petitioner,

v.

BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION,
Respondent.

ORDER

PER CURIAM:

AND NOW, this 16th day of March, 1998, the Petition for Allowance of Appeal is hereby DENIED.

A True Copy Candace Y. Fry
as of: March 16, 1998
Attest: /s/Candace Fry
Chief Clerk
Supreme Court of Pennsylvania

(2)

No. 98-176

FILED
AUG 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

FRED E. YOUNG, INC.,

Petitioner,

vs.

BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Pennsylvania Superior Court on a state law issue affords any basis for review in this matter.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding as Fred E. Young, Inc., Petitioner and Brush Mountain Sportsmen's Association, Inc., Respondent. There is no parent or subsidiary company of any party to be listed.

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STATEMENT OF THE CASE

This case involved a dispute as to the title of rural land in what is now Blair County, Pennsylvania. The dispute arises from apparent overlapping surveys of the William Allen and John Porter warrants and the Ludwick Sells warrant. The Statement of the Case up to the filing of this petition is accurately set forth in the opinion of the Pennsylvania Superior Court as follows:

> During the late 1700's, the parties' predecessors in title, Ludwick Sells, William Allen and John Porter, began to settle the Pennsylvania wilderness in what is now Blair County. Ludwick Sells was granted a warrant in 1786, but did not have his property surveyed until 1794. The Porter and Allen tracts were respectively warranted and surveyed in 1795 and 1796. However, both the Porter and Allen warrants noted that there were improvements on the land and that the owners' respective interests commenced as of 1792. Patents were later issued for the Porter, Allen and Sells tracts in 1800, 1808 and 1834, respectively.
>
> The surveys of the Porter, Allen and Sells tracts were all performed by the same individual, John Canan. The Sells survey identified William Allen and Michael Fetters as adjoining landowners. Neither the Porter nor Allen surveys referred to Sells as an adjoiner, however. For reasons which are unclear, Sells did not settle on the land identified in his survey as adjoining that of Allen and Fetters. He instead located to the southwest on a tract adjoining John Porter's land.
>
> Appellee, Brush Mountain Sportsmen's Association (Brush Mountain), acquired the land formerly owned

by John Porter by two separate conveyances in 1948 and 1949. Appellant, Fred E. Young, Inc. (Fred Young) subsequently purchased the former Sells tract in 1965. After appellant bought the property, a dispute arose between the parties as to the ownership of approximately forty acres of land encompassed within the metes and bounds descriptions of both the Sells and Porter tracts. Consequently, appellant commenced a quiet title action against appellee in April of 1966.

The Honorable Samuel Jubelirer conducted hearings thereon in September, 1967, March 1968 and July, 1968. For reasons which do not appear of record, the case languished in the Court of Common Pleas until 1981. On June 10, 1981, Judge O'Kicki issued an order denying appellant's quiet title action, but this order was not entered upon the docket until April 16, 1984. Appellant timely filed exceptions, as well as post-trial motions and supplemental post-trial motions to the trial court's order. Judge O'Kicki dismissed the exceptions in October of 1986, but a final judgment was never entered. No appeal was taken.

Appellant renewed its request for relief by filing the instant declaratory judgment action against appellee in February of 1991. Appellee filed preliminary objections asserting that the action was barred by reason of the doctrine of res judicata. Judge Jolene Grubb Kopriva agreed and dismissed appellant's complaint. Appellant timely appealed to this court. In an unpublished memorandum, we reversed an remanded for trial. *See Fred E. Young, Inc. v. Brush Mountain Sportsmen's Association,* 424 Pa. Super.

> 658, 617 A.2d 399 (1992) (No. 02000 Pittsburgh 1991). The Supreme Court declined to grant *allocatur*. *Id.*, 533 Pa. 611, 618 A.2d 401 (1992).
>
> Upon remand of the case, appellant filed a motion for summary judgment as well as a petition for rule to show cause why certain other property owners should not be notified of this litigation and permitted to intervene therein. The trial court denied both motions. The Honorable Noman D. Callan, sitting as the sole trier of fact, conducted a three day trial on September 27 and 28, 1995 as well as on December 27, 1995.
>
> Judge Callan filed an adjudication and decree *nisi* in February 1996. Appellant timely filed post-trial motions which were ultimately dismissed. A final decree was thereafter entered upon the docket. Appellant timely appealed therefrom. Opinion of the Pa Superior Court No. 00659 Pgbh at page 96.

Following denial of Allowance of Appeal by the Pennsylvania Superior Court, Petitioner filed the instant petition for a Writ of Certiorari alleging that

> the Superior Court of PA violated Petitioner's constitutional right not to be deprived of its property without due process of law in finding that Petitioners predecessors in title had forfeited Petitioners right to claim superior title by their not attacking the tax sale through which Respondent based its claim of ownership.

(Petition).

The Petition, however, misrepresents what the Superior Court said and the basis for the Courts' opinion since the discussion with respect to the tax sale was not the holding of the Court. By misrepresenting the holding of the Superior Court and reaching erroneous conclusions as to the law, Petitioner seeks to create a basis for review by this Court of a fact sensitive determination founded entirely upon state law. Both Judge O'Kicki, the trial judge in the action to quiet title, and Judge Callan, the trial judge in the instant proceeding found that the evidence relating to the nature and substance of alleged adverse possession by Petitioner and his predecessors in title was not of sufficient quality to establish adverse possession under the law of Pennsylvania irrespective of the tax sale in question. What the Court did say with respect to the tax sale was that it eliminated any unripened adverse possession that may have existed prior to the sale.

REASONS FOR DENYING THE WRIT

I.

THE FINDING OF THE PENNSYLVANIA SUPERIOR COURT COMPLAINED OF IS MERE DICTA AND THIS CANNOT RESULT IN THE DEPRIVATION OF A CONSTITUTIONAL RIGHT OR A BASIS FOR REVIEW.

In order for a determination of the State Court to be reviewable by this Court it must be a final judgment of the highest court of the state where, inter alia, the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution. 28 U.S.C.A. § 1257. To be encompassed within a final judgment of the State Court the determination in question must be a holding of the Court. If it is mere dicta, and not the holding of the Court it cannot operate to deprive Petitioner of a right and is thus not reviewable and

similarly if it is only tangential to the immediate question it is also not reviewable. *Pennsylvania v. Board of Directors of City Trusts,* 353 U.S. 230, 1 L. Ed. 2d 792 (1957). Furthermore, this Court has stated many times that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn* 324 U.S. 117, 125, 89 L. Ed. 789, 794 (1945). Petitioner claims that the Superior Court decided that a tax sale in Respondent's chain of title cut off any period of adverse possession on the part of Petitioner (allegedly in violation of his due process rights) and prevented any rights of adverse possession from accruing during the time in which title was in the County of Blair as a result of the tax sale. This analysis was not part of the holding of the Superior Court.

The Superior Court held that Respondent's chain of title was superior from the inception of the warrant, since Ludwick Sells, Petitioners predecessor, had abandoned his claim by not surveying the property or establishing improvements within seven years of his application for the warrant, all in accordance with Pennsylvania law. Contrary to Petitioners assertion that the tax sale was dispositive of the issue of adverse possession, the Superior Court disposed of the issue of adverse possession as follows:

> In its second allegation of error, appellant contends that it acquired title to the property by adverse possession. Appellant does not support his argument with citation to any pertinent legal authority in contravention of Pa. RAP, Rule 2119, 42 Pa. C.S.A. When appellant has failed to cite any authority in support of a contention, the claim is waived. *Bunt v. Pension Mortgage Associates, Inc.*, 446 Pa. Super. 359, 368, 666 A.2d 1091, 1095 (1955). Opinion of the PA Superior Court to No. 00659 Pgbh 96 at Page 11.

The Superior Court, in the next sentence goes on to say: "However, appellant would not be entitled to any relief *even if we were to consider this issue.*" (Emphasis added). The Court then went on to review the evidence of adverse possession and in the course of that discussion reviewed the issues regarding the tax sale in question. It is clear that this discussion is hypothetical and is not part of the holding in the case, as the Court held that the issue of adverse possession was procedurally waived. Thus the issue is not reviewable because the entire subject of adverse possession was deemed procedurally waived, the discussion relating to the tax sale as a part of the adverse possession issue was mere dicta and the decision rests on adequate state grounds.

II.

ASIDE FROM THE TAX SALE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURTS' DECISION THAT THE EVIDENCE OF ADVERSE POSSESSION ON THE PART OF PETITIONER WAS DEFICIENT.

Even if the issue were not waived and if the discussion of the tax sale and the Court's conclusions in connection therewith were not mere dicta, there is still no basis for review, as the Superior Court and the lower court were correct in their conclusions regarding the insufficiency of evidence of adverse possession. Judge Callan, the trial court judge, chose to adopt the findings of Judge O'Kicki issued in the prior action to quiet title since there was no additional evidence presented by the Plaintiff in regard to adverse possession. In this regard, Judge Callan found as follows:

> 7. With respect to the Plaintiff's reliance on the elements of adverse possession, he has failed to

show that there has been persistent and continual adverse possession for at least 21 years.

8. The Plaintiff has failed to produce any evidence that the use that did occur was not permissive or that such use was hostile to the true owner.

9. The Plaintiff sought to tack the uses of prior predecessors in land without having shown any use exercised by himself on said land. He is not a user and can not tack the uses of the land, if any, by others who may have been predecessors in title. Opinion of Norman D. Callan, Judge 91 CP 000392 Blair County at page 28.

The Superior Court in its opinion indicated that the possession of the Delancey family (Petitioner's predecessor in title) related primarily to the undisputed southern portion of the Sells tract. Thus the statement of the Superior Court, even if it were not dicta, that the tax sale renders the Delancey possession prior to 1936 irrelevant is of no moment because the Delanceys did not exercise continuous adverse possession of the disputed tract and there was certainly no ripened adverse possession resulting from Delancey's possession. The Superior Court acknowledged that there was evidence that the Kneidinger family leased and farmed some portion of the disputed tract from approximately 1940 until the Petitioner purchased the property. The Superior Court also recognized however, that the evidence showed that Respondent began cultivating the disputed land in 1950 and in January 1950 entered into a contract with the State Game Commission regarding cultivation of food plots in the disputed area. There was also evidence that Respondent strung wire fencing in the area at that time and the minutes of Brush Mountain at a meeting held in 1949 indicate that the property was to be enclosed with wire. Brush Mountain entered

into further contracts with the State Game Commission regarding cultivation of food plots on the disputed tract respectively dated May 13, 1961 and August 2, 1976. Thus the alleged adverse possession of Kneidinger is factually unclear and there is substantial evidence to support the conclusion of Judge O'Kicki and Judge Callan that aside from the tax sale the Plaintiff had not met his burden of establishing adverse possession within the standards required by the law of Pennsylvania. Consequently the statement of the Superior Court that the tax sale would have interrupted any period of adverse possession during the time that title was in the County is dicta within dicta as the Court already determined that the evidence was insufficient. Accordingly, no claim of violation of Constitutional rights can be predicated upon the Superior Court's findings with respect to the tax sale as petitioners evidence was deficient to establish adverse possession irrespective of the tax sale. Again this is a judgment of a state court resting on adequate state grounds. *See Herb v. Petcairn, supra.*

III.

THERE WAS NO VIOLATION OF DUE PROCESS IN PASSING TITLE TO THE COUNTY THROUGH THE 1936 TAX SALE.

Further the Petitioner has totally missed the point with respect to the effect of the tax sale. Since Petitioner's chain of title is inferior and Petitioner had no paper title to the disputed tract (as properly determined by Judge Callan and affirmed by the Superior Court) the tax sale would be valid to pass to the County the interest of the actual owner of the tract, in this case the Baker family. Since any adverse possession at that point had not ripened into title in Petitioner's predecessors there was no necessity of notice to them of the tax sale. Unripened adverse possession does not create an interest in the property. *Brennan*

et al. v. Pine Hill Collieries Co. et al., 312 Pa. 52, 167 Atl. 776 (1933). Thus the County held a valid tax title to the property and no adverse possession could accrue during the County's title as adverse possession cannot accrue against a governmental entity holding a tax title. *Torch v. Constantine*, 227 Pa. Super 427, 323 A.2d 278 (1974). It has already been determined factually that the Delanceys did not continuously possess and/or conduct activities on the disputed portion of the Sells tract and the alleged adverse possession by Kneidinger (the substance of which is factually deficient) did not commence until 1940 while the County held title. Thus the Superior Court was absolutely correct in its analysis that the tax sale to the county interrupted any previous unripened adverse possession (if any there be) and eliminated any possibility of adverse possession accruing during the period that the County held title. Since notice to Petitioner's predecessors was not necessary, passage of the superior chain of title to the County through the tax sale and consequent elimination of unripened adverse possession was not a violation of due process rights. Thus Petitioner's claim of a violation of due process rights is clearly an attempt to manufacture a reviewable issue where none exists.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Court reject Petitioners' request for a writ of certiorari.

Respectfully submitted,

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